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4 MICHAEL L LUCKERT,
5 Plaintiff,
6 v.
7 O. SMITH, et al.,
8 Defendants.
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10 Case No. [19-cv-08204-PJH](#)
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12 **ORDER**
13

14 Re: Dkt. No. 50
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16 Plaintiff, a former county detainee, proceeds with a pro se civil rights complaint
17 under 42 U.S.C. § 1983. He alleges that at the public library, Patrol Officer Ochoa and
18 Deputies Smith, Gutierrez, Brule and Espiritu used excessive force in arresting him and
19 Deputies Gutierrez and Mendoza used excessive force while placing him in a cell at the
20 county jail. These defendants have filed a motion to dismiss on the grounds that plaintiff
has failed to prosecute this action by failing to respond to discovery requests and failing
to appear for a deposition. Defendants have also filed a motion for summary judgment
on the merits.

21 **MOTION TO DISMISS**
22

23 A district court may dismiss an action for failure to prosecute, for failure to comply
24 with a court order, or for failure to comply with the Federal Rules of Civil Procedure. Fed.
25 R. Civ. P. 41(b); *Link v. Wabash R.R Co.*, 370 U.S. 626, 633 (1962). A case should only
26 be dismissed when the failure to comply is unreasonable. *McKeever v. Block*, 932 F.2d
27 795, 797 (9th Cir. 1991). A court should consider five factors before dismissing an action
28 under Rule 41(b): (1) the public interest in the expeditious resolution of the litigation: (2) the
court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the

1 availability of less drastic sanctions; and (5) the public policy favoring the disposition of
2 actions on their merits. *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130 (9th Cir. 1987).
3 The court should also afford the litigant prior notice of its intention to dismiss. *Id.* at 133.
4 While a dismissal for failure to prosecute is generally with prejudice, a district court may
5 also opt for the less drastic remedy of dismissal without prejudice. See Fed. R. Civ. P.
6 41(b); *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 42-43 (2d Cir. 1982).

7 The court ordered service of the amended complaint and on December 9, 2020,
8 defendants appeared. Docket No. 27. Plaintiff was not in custody during some of the
9 relevant time. Docket Nos. 40, 41, 46, 47. On March 16, 2021, defendants served
10 written discovery requests on plaintiff. Motion to Dismiss (“MTD”), Wang Decl. ¶ 2.
11 Plaintiff never responded. *Id.* On March 25, 2021, defendants sent plaintiff a letter
12 requesting dates of availability in April or May for his deposition. *Id.* ¶ 3. Plaintiff never
13 responded. *Id.* On April 26, 2021, defendants sent another letter requesting plaintiff’s
14 availability in May for a deposition, but he never responded. *Id.* ¶ 4. On May 10, 2021,
15 the parties met and conferred by telephone regarding discovery. *Id.* ¶ 5. Plaintiff
16 indicated that he sent defendants written correspondence regarding discovery, but
17 defendants never received any letters regarding discovery. *Id.*

18 On May 24, 2021, defendants sent plaintiff a letter and informed him that because
19 he never provided dates for a deposition, a deposition had been scheduled for June 3,
20 2021, at 10:00 a.m. via remote means. *Id.* ¶ 6; Exs. C, D. Defendants also demanded
21 responses to discovery requests and to meet and confer regarding plaintiff’s objections to
22 defendants’ discovery responses. *Id.* On June 1, defendants called plaintiff, but he did
23 not answer. *Id.* ¶ 7. Defendants left a voicemail confirming plaintiff’s availability for the
24 June 3, 2021, deposition. On June 2, 2021, plaintiff left a voicemail stating that he was
25 available for the deposition. *Id.*

26 Plaintiff failed to appear for his deposition on June 3, 2021. *Id.* ¶¶ 8, 9.
27 Defendants called plaintiff to ask if would attend, plaintiff stated that he was on another
28 important call and was not available that morning. *Id.* ¶ 9.

1 On June 8, 2021, defendants re-noticed plaintiff's deposition for June 21, 2021, at
2 10:00 a.m. by remote means. *Id.* ¶ 10. On June 16, 2021, defendants called plaintiff to
3 confirm his availability, but the call went to voicemail and the voicemail box was full. *Id.* ¶
4 11. Defendants texted plaintiff with defense counsel's phone number. Plaintiff never
5 called. *Id.*

6 Plaintiff failed to appear for his deposition on June 21, 2021. *Id.* ¶ 12; Ex. J.
7 Defendants called plaintiff that morning to confirm his appearance, but the call went to
8 voicemail and the voicemail box was full. Defendants texted plaintiff with defense
9 counsel's phone number. Plaintiff never called. *Id.*

10 Plaintiff states that on June 3, 2021, he was homeless, and he could not charge
11 his phone for the first deposition. Docket No. 63 at 1. Plaintiff state that he was in
12 custody at Santa Rita Jail beginning on June 6, 2021; therefore, he could not
13 communicate with defendants for the second deposition. *Id.* at 2. Based on plaintiff's
14 most recent change of address notice, he does not appear to currently be in custody.
15 Docket No. 66.

16 While the court is sympathetic to plaintiff's difficulties in litigating this case and
17 cooperating with defendants due to suffering from homelessness and being incarcerated
18 for a period of time, it was plaintiff who initiated this lawsuit. If plaintiff wishes to proceed
19 with this case, he must cooperate with defendants and follow court orders. Defendants
20 demonstrated that they have spent a great deal of time and effort attempting to obtain
21 discovery from plaintiff and to depose him. Plaintiff has failed to cooperate with the
22 discovery process. Plaintiff will be provided one final opportunity to respond to
23 defendants' discovery requests and to be deposed. If plaintiff fails to respond to
24 defendants' discovery requests and fails to be deposed this case will be dismissed with
25 prejudice.

CONCLUSION

27 1. Defendants' motion to dismiss or in the alternative for summary judgment
28 (Docket No. 50) is **DENIED** without prejudice.

1 2. Plaintiff shall respond to defendants' discovery requests and sit for a deposition
2 by **February 4, 2022**. If plaintiff fails to cooperate with defendants and fails to follow the
3 court's order, defendants shall file an amended motion to dismiss for failure to prosecute
4 and this case may be dismissed with prejudice. If plaintiff is deposed, defendants may
5 refile the motion for summary judgment or file an amended motion for summary judgment
6 if they wish to present new facts or arguments from the deposition

7 **IT IS SO ORDERED.**

8 Dated: December 30, 2021

9
10 /s/ Phyllis J. Hamilton

11 PHYLLIS J. HAMILTON
12 United States District Judge

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United States District Court
Northern District of California